

(1373)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

MRS. FIELDS FRANCHISING,
LLC, A DELAWARE LIMITED
LIABILITY COMPANY,

CASE NO. 2:14-CV-776

PLAINTIFF,

VS.

BEKTROM FOODS, INC., A
NORTH DAKOTA CORPORATION,

SALT LAKE CITY, UTAH
AUGUST 25, 2015

DEFENDANT.

PLAINTIFF'S RENEWED MOTION TO DISMISS
BEFORE THE HONORABLE BRUCE S. JENKINS
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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1 P-R-O-C-E-E-D-I-N-G-S

2 (1:24 PM)

3 THE COURT: Good afternoon. And why don't we turn
4 to Mrs. Fields Franchising versus Bektrom Foods. It's
5 14-C-776, calendared on a motion to dismiss. And those who
6 are making appearances, if you'll make a record. Tell us who
7 you are and whom you represent.

8 MR. ANDREASON: Good afternoon, Your Honor, Rod
9 Andreason of Kirton McConkie on behalf of the Plaintiff,
10 Mrs. Fields Franchising.

11 THE COURT: Okay.

12 MR. BENNION: Your Honor, David Bennion and Zach
13 Winzeler for the Defendant, Bektrom Foods.

14 THE COURT: Okay. You go ahead.

15 MR. ANDREASON: Thank you, Your Honor. Your Honor,
16 the heart of this motion lies in two basic principles. One,
17 you still have to follow the standards of Iqbal and Twombly.
18 You need actual allegations and you need to have, not just
19 conclusions, but plausible ones, plausible -- you need
20 allegations and conclusions.

21 And then, secondly, if you get two chances to file a
22 pleading and you fail to do it correctly, your pleading should
23 be dismissed. In this case we've examined Bektrom's answer
24 and counterclaim once before. You reviewed it. You discussed
25 whether or not it had conclusions or actual allegations. You

1 viewed whether they were plausible or not, and you dismissed
2 it, giving Bektrom the chance to replead and repair its answer
3 and counterclaim.

4 And it did provide more detail. I'll admit, Your Honor,
5 they've given more facts, but in some areas they have not done
6 any additional facts and they have completely failed to
7 provide plausible facts.

8 It's important I think, Your Honor, that we remember what
9 the forest is here so we don't get lost in the trees. We have
10 a license agreement, five years, guaranteed payments. They
11 only made the first payment. So in 2012 they made their
12 payment, but nothing in 2013, nothing in 2014, your Honor. So
13 Mrs. Fields was well within its right to say this license
14 agreement is done.

15 So when Bektrom says, well, a few months later we
16 submitted some kind of samples to you, it's too late. They've
17 had their chance and they failed to the most material aspect
18 of this entire agreement, making their annual guaranteed
19 payments.

20 Mrs. Fields terminated the agreement. Bektrom owed
21 \$754,000. This doesn't seem to really be in dispute, Your
22 Honor. At our last hearing you asked Bektrom's counsel, who
23 is here today, looking at just the words of the contract, did
24 you pay them the \$750,000? Counsel responded we did not.
25 Yes, the contract provided for those payments.

1 So when Bektrom complains now that Mrs. Fields didn't
2 review samples they submitted months later, we're comparing
3 September of 2013 to December or later, it's too late.
4 Bektrom has already missed the boat.

5 You reviewed their counterclaim and answer and dismissed
6 it using Twombly's two standards, and again reminding us that
7 there have to be allegations and not conclusions, detail, and
8 they cannot be implausible.

9 Now, you dismissed Bektrom's claims that Mrs. Fields
10 failed to review, let alone approve, artwork, and this is what
11 you said at the hearing, speaking to counsel for Bektrom.
12 Frankly, I'm interested in what was submitted, when it was
13 submitted. I have got to have, it seems to me, something more
14 than you've got there now.

15 Well, Your Honor, they have amended their answer and
16 counterclaim and they have provided nothing in that regard, no
17 additional supporting information. This is a reason why this
18 amended answer and counterclaim should be dismissed.

19 Second, you addressed Bektrom's waiver defense in which
20 Bektrom claimed that Mrs. Fields waived the guarantee payments
21 in order to get the royalty payments they were already
22 entitled to get. Now, this is how Bektrom failed the first
23 time when we talked about this before you. First, they gave
24 only conclusions, not details. Second, this alleged agreement
25 actually contradicts the license agreement. They're supposed

1 to give both, not just one. And, third, it was completely
2 implausible because if Mrs. Fields is entitled to both the
3 guarantee payments and the royalty payments, why would it give
4 up the guarantee to get some amount of royalty payments? Why
5 would it agree to permanently give up over \$750,000? Why
6 would it do so in exchange for zero consideration?

7 Now, in its amended answer, to its credit, Bektrom does
8 give more detail, but first it contradicts its prior
9 statements. First, it says that instead of the oral waiver
10 that it alleged last time when we appeared before you, there
11 was actually a written modification of the license agreement.
12 Then in its opposition frankly gives a third story, both oral
13 and a written, three inconsistent stories, Your Honor.

14 But in this whole arena Bektrom still absolutely fails to
15 address implausibility. Why does this make any sense that
16 Mrs. Fields would have even made such a deal?

17 Now, Bektrom claimed that Mrs. Fields accepted its offer
18 in writing in its pleading and then omitted to provide that in
19 its answer and counterclaim. We asked for that, as you may
20 have seen in the exhibits, Your Honor. They refused to
21 provide that. So we found what they think -- we think they
22 mean, and they have since confirmed that.

23 Here is what it says, Your Honor. And this is something
24 that you could read to see if their allegations are plausible.
25 This is Exhibit C to the Andreason declaration for our motion.

1 Mrs. Fields says we are fine to except the proposal but we
2 cannot release the 190,000 order until we are paid the 40,000.
3 If we are allied -- aligned, pardon me, we can begin drafting
4 the documentation.

5 So clearly Mrs. Fields says, well, we can accept part but
6 not the other part. Here is our counteroffer. There's no
7 evidence that it was accepted. They don't claim that it was
8 accepted. There's no payment of this \$40,000 number. The
9 entire basis for this so-called agreement in writing -- which
10 is not a waiver by the way. That's a written modification --
11 is an e-mail that shows a counteroffer.

12 Now, when we look at plausibility, Your Honor, we're not
13 getting into disputes of fact, this is their plausibility, and
14 it doesn't weigh out.

15 Third, Bektrom provides the new affirmative defense in
16 its answer of fraudulent inducement of the license agreement,
17 which is interesting since they have claims under the license
18 agreement. So now they're saying in part that it was
19 fraudulently induced. In fact this contradicts their previous
20 answer where they admitted that it was a valid and binding
21 agreement. So it's not just alternative pleading, Your Honor,
22 it's contradictory admissions.

23 But those allegations themselves don't give any of the
24 specificity required for fraud allegations under Rule 9(b).
25 Bektrom only says, and I'll quote -- I'll quote -- I'll show

1 you the quote in a moment. Mrs. Fields made, quote,
2 representations before Bektrom signed the license agreement
3 that Debbie Fields was returning to Mrs. Fields and would be
4 promoting the Mrs. Fields brand in an effort to revive the
5 declining value of the Mrs. Fields' marks.

6 Your Honor, I'd submit pretty plainly that doesn't meet
7 Rule 9(b) for pleading fraud with particularity. And they
8 make allegations, they make claims, that they're entitled to
9 damages for breach of the license agreement. So that new
10 affirmative defense of fraudulent inducement should fall.

11 Next on the gift sets -- and it's hard to keep some of
12 these straight, Your Honor, so I have to look at my notes to
13 check too. But let's talk about the gift sets for a moment.
14 Bektrom Claims that because the license agreement makes two
15 references to gift sets, that it now has an exclusive license
16 to sell anything to anyone as long as it's a gift in a set.

17 But, Your Honor, it can't be that broad, and there's no
18 evidence, there's no even allegation, that it is that broad.
19 If it were so, not only could they submit an oven mitt, they
20 could potentially say that a portable stove was part of a gift
21 set, and that they had an exclusive license to provide such
22 gift sets.

23 It's completely implausible. It contradicts the terms of
24 the license agreement, which only gives three things that they
25 have an exclusive license for: Spice shakers, spice grinders,

1 dry baking mixes. That's it. So to say that we can now do a
2 gift set and no matter what, Love Cooking or any other entity
3 we have an exclusive license to, we have the exclusive right
4 to provide anything that's a gift in a set is completely
5 implausible. Bektrom has no definition or limitation
6 regarding these gift sets. They don't even try to make it fit
7 within section four of the license agreement that issues the
8 exclusive agreement.

9 Worse, Bektrom claims that Mrs. Field, quote, withdrew
10 approval after Bektrom had expended resources developing and
11 manufacturing the licensed products. But, Your Honor, we've
12 provided the actual e-mail they're referencing. That's
13 Exhibit D to the Andreason declaration. The withdrawal of
14 approval happened two hours later.

15 Now, I'm not sure what Bektrom thinks it did in those two
16 hours, but it's highly implausible to claim that it expended
17 tremendous resources and is entitled to compensation because
18 of two hours change in withdrawing approval for these gift
19 sets. In its opposition Bektrom really has no answer for why
20 this discrepancy exists, why it would have these claims based
21 on two hours of delay in the withdrawal time.

22 Next the spice shakers and grinders, Your Honor. Bektrom
23 provides an unsigned letter purporting to show that in
24 December of 2013 Bektrom submitted artwork and samples for
25 spice shakers and grinders to Mrs. Fields. But as we've

1 already discussed, this was months after it had already
2 committed the breach of failing to provide the fundamental
3 part of the agreement, that guarantee payment, \$150,000, which
4 it frankly hasn't provided since either.

5 As I'm sure you've dealt with many times, under Utah law,
6 and I'm quoting here from Cross v. Olson, referenced from one
7 of our cases in our brief, under the first breach rule, a
8 party first guilty of a substantial or material breach of
9 contract cannot complain if the other party thereafter refuses
10 to perform. He can neither insist on performance by the other
11 party nor maintain an action against the other party for a
12 subsequent failure to perform.

13 And as you know, on a motion to dismiss we're talking
14 about maintaining an action. They cannot maintain an action
15 for events after September 30, 2013, and that's what they're
16 trying to do.

17 Ultimately, Your Honor, this is a plain contract dispute.
18 They admit they didn't make the payments. They have several
19 responses but none of them are plausible. They've been given
20 a chance to provide additional information, to make the detail
21 sufficient and not just be conclusions, and also to make
22 plausible ones, but they haven't done it.

23 As we pointed out last time, on a policy basis, if we
24 proceed past this point in the case, we're going to have
25 mountains of discovery, a lot of waste and time and money over

1 a fairly clear contract breach with no plausible response.

2 The Supreme Court in Twombly says we dismiss such claims,
3 and then here is the quote, lest a plaintiff with a, quote,
4 largely groundless claim be allowed to take up the time of a
5 number of other people, with the right to do so representing
6 an in terrorem increment of the settlement value, closed
7 quote.

8 Your Honor, this Court has already dismissed Bektrom's
9 answer and counterclaim once for lack of specificity and
10 plausibility. You gave Bektrom another chance to plead, and
11 they've added some specifics and missed others. Clearly they
12 have not provided the plausibility, and therefore the Court
13 should dismiss their answer and counterclaim. Thank you, Your
14 Honor.

15 MR. BENNION: Your Honor, counsel has been painting
16 with a pretty broad brush. Let's talk about the shakers
17 and -- the spice shakers and spice grinders for a minute.
18 First of all, right in the contract, it's an exclusive
19 contract, with a license to use Mrs. Fields' name, brands,
20 logos and trademarks on spice shakers and spice grinders.

21 Mrs. Fields took a \$75,000 upfront payment at the time of
22 the contract's signing for that right. Never did Mrs. Fields
23 give the right to Bektrom to use its names, its marks and so
24 forth on spice shakers or spice grinders.

25 Counsel has just said two times that reference, well,

1 that didn't happen until 2013, and they were already behind
2 and that was the basis. That was never a basis stated by
3 Mrs. Fields in realtime.

4 And what he's doing, as he did in the brief, just simply
5 ignoring allegations in the amended counterclaim. For
6 example, in paragraph 11 of the counterclaim it states in
7 2012 -- that's a time frame that he just admitted Bektrom was
8 current. In 2012 Bektrom submitted artwork samples for spice
9 shakers and grinders to Mrs. Fields. Mrs. Fields'
10 representative, Dustin Finkel, told Bektrom's representative,
11 Aldon Reed, on at least two occasions in 2012 that Mrs. Fields
12 was not sure that spice shakers and spice grinders were a good
13 fit for Mrs. Fields' brand.

14 In other words, they gave a license to put the name on
15 those items, and they took money for that license, and then
16 when artwork and samples were submitted requesting approval
17 for those very items that are right in the contract, they just
18 said, ah, we don't think that's a good fit. That happened at
19 a time when Bektrom was current, not when they were in breach.
20 That is a breach of contract. When --

21 The Court: You claim an early breach on the part of
22 the Plaintiff?

23 MR. BENNION: Pardon?

24 THE COURT: I say you claim an early breach on the
25 part of the Plaintiff?

1 MR. BENNION: Yes. Yes, absolutely. In 2012 they
2 refused --

3 THE COURT: Okay.

4 MR. BENNION: And we have a specific allegation,
5 which he just completely ignored. He went to paragraph 12
6 where we make a similar --

7 THE COURT: We're really concerned here with the
8 sufficiency of the pleadings. The motion to dismiss is
9 essential here, a motion in reference to the pleadings.

10 MR. BENNION: Well, and that's where they really get
11 the horse in front of the cart, Judge. We make specific
12 allegations about date, time, people, and specific
13 communications, and then he says, well, you're not giving us
14 detail.

15 THE COURT: Tell me your justification for, if I
16 remember correctly, the last defense or counterclaim, namely
17 seeking a declaratory judgment. What are you asking me to
18 declare?

19 MR. BENNION: Well, it's probably redundant, but
20 it's the --

21 THE COURT: If it is, it's dismissed.

22 MR. BENNION: It has one viable basis that's
23 independent, Judge, which is this. They want a payment in the
24 future for the minimum royalties for years that haven't even
25 happened yet when they have been in breach themselves. We

1 just want --

2 THE COURT: It's a breach question.

3 MR. BENNION: Pardon?

4 THE COURT: It's a breach question. You claim
5 counter breaches basically.

6 MR. BENNION: We say we didn't pay because you
7 didn't perform.

8 THE COURT: Uh-huh.

9 MR. BENNION: There's conditions precedent to our
10 payment. Obviously the condition is you're going to let us
11 use your name. If they don't let us use their name, how are
12 they entitled to payment?

13 THE COURT: Okay.

14 MR. BENNION: And so --

15 THE COURT: Well, I understand that. I just don't
16 understand the effort at getting a declaration of something.

17 MR. BENNION: It's just to try to foreclose a future
18 obligation that they claim that we don't think should exist.

19 THE COURT: Well, why are we talking about the
20 future? You both claim -- you both asserted breaches.

21 MR. BENNION: True.

22 THE COURT: If they breached, you're not enforcing a
23 contract. You're dealing with the breach.

24 MR. BENNION: And so it's really an alternative --
25 it's an alternative claim that -- that if you grant our -- if

1 you were to grant our counterclaim on breach, we wouldn't need
2 that remedy.

3 THE COURT: I don't think you need it at all, and
4 I'm going to dismiss it. We don't need it. It's redundant,
5 as you acknowledge. It's implicit in other allegations.

6 MR. BENNION: Agreed. Your Honor, in addition to
7 the spice shakers I wanted to comment about the mixes. Again,
8 this is where counsel paints with a broad brush claiming, hey,
9 mixes aren't even part of this contract. But right in the
10 definition of licensed products, which is section four of the
11 agreement, it says the following merchandise utilizing,
12 bearing, or otherwise relating to the property, colon, and
13 then it starts listing things, spice shakers, spice grinders,
14 mix -- dry baking mixes for cupcakes, cookies and cakes,
15 pancakes and so forth. The gift sets include and utilize
16 those very things.

17 Then you go to paragraph eight, which is the royalty
18 rate, and it says for baking mixes and gift sets it's five
19 percent. Now he's trying to argue that gift sets aren't part
20 of this contract. Clearly it is.

21 THE COURT: Well, are gift sets of what?

22 MR. BENNION: Gift sets that include like a dry
23 brownie mix with a pan, or a cake mix with an oven mitt.
24 They're like a -- they're combo sets.

25 And here is the other thing that he omitted. They

1 approved gift sets at certain times, and then Bektrom made
2 them and sold them. But then at a later time they come along
3 and say, well, we're not going to approve those anymore
4 because that might be in conflict with one of our other
5 licensees. And when you --

6 THE COURT: It's obvious that you folks have got --

7 MR. BENNION: Pardon?

8 THE COURT: You've got conflicts.

9 MR. BENNION: Yeah, because in paragraph six it
10 talks about what's the exclusivity of this contract?
11 Exclusive. They told us we had an exclusive contract for gift
12 sets. Then they tell us, ah, we're not sure we're going to
13 approve these because that will conflict with our other
14 licensee. And so that is a breach, Your Honor.

15 They can't be paid money when they refused to let us use
16 the names that they licensed us to be able to use. It is
17 plausible. There is a mountain of evidence, and we're way
18 ahead of ourselves on the evidence, especially when you think
19 about the standards of Rule 12. They draw inference after
20 inference their way from the documents.

21 The Court: I'm interested only in the adequacy of
22 the pleadings at this point.

23 MR. BENNION: We went above and beyond, Your Honor.
24 When we made our answer in the first place we had basic
25 information from our client, who is in New Jersey, and so we

1 answered. And then Your Honor dismissed the answer. And so
2 we went back to the well and said, okay, we need details. And
3 so, for example, I was standing right here talking about the
4 oral conversation that my client had told me about in which
5 they had agreed to waive the royalty. He said why would they
6 do that? There's a very easy answer. You can get half a loaf
7 or --

8 THE COURT: Just tell me why your pleadings are
9 adequate.

10 MR. BENNION: Pardon?

11 THE COURT: Tell me why your pleadings are adequate.

12 MR. BENNION: Because they allege specific facts
13 that on their face are plausible to show that they breached
14 the contract.

15 THE COURT: Okay. Well, let him respond and we'll
16 go from there.

17 MR. ANDREASON: Your Honor, I believe I've heard
18 only two things that I could respond to that even merit a
19 response. One is that part of their allegations is that they
20 claim something happened in 2012, and that is paragraph 11.
21 They claim in that paragraph they submitted artworker samples
22 and were told by Dustin Finkel on some two occasions, that
23 they don't know when or how, that Mrs. Fields wasn't sure that
24 spice shakers were a good fit.

25 Now, Your Honor, that does predate the September 30, 2013

1 material breach. I concede that. However, these allegations
2 do not have any specificity as to when they occurred.

3 THE COURT: Well, that's one of the interesting
4 opportunities that you have to use written interrogatories or
5 take somebody's deposition. Tell me why their pleadings are
6 inadequate. I've dismissed the effort to get a declaratory
7 judgment as to one. Tell me why the remaining counterclaim or
8 defenses are inadequate.

9 MR. ANDREASON: Your Honor, as to fraudulent
10 inducement, as I mentioned, not adequately pleaded, doesn't
11 meet Rule 9(b), no specific facts. So that's fraudulent
12 inducement, Your Honor.

13 THE COURT: And while facts are essential, the
14 Supreme Court didn't repeal the short and plain statement
15 provision in the rules. It indicated that there ought to be
16 enough to provide plausibility. And, quite frankly, counsel,
17 I've looked through the material, I've looked through the
18 pleadings, I've digested those as best I can. I thought your
19 motion was good in reference to the declaratory judgment.
20 We've granted that. Send me an order. As to the rest, I
21 think it's adequate, and we'll go from there. The motion to
22 dismiss is denied.

23 I'll save you a trip if you want to set up a scheduling
24 time right now. File your response -- if you'll be kind
25 enough to file your response within 10 days.

1 MR. BENNION: The order you mean? Oh, oh, sorry. I
2 misunderstood.

3 MR. ANDREASON: To the counterclaim, Your Honor?

4 THE COURT: I'm sorry?

5 MR. ANDREASON: Mrs. Fields' response to the
6 counterclaim, Your Honor?

7 THE COURT: Yes. If you'll do that within 10 days.
8 Assuming that you're going to do that, I can save you a trip
9 if you want to tell me how soon you can get your discovery
10 work done.

11 MR. ANDREASON: Your Honor, I probably would have to
12 have that extra trip because I don't have that kind of time
13 schedule laid out in front of me.

14 THE COURT: Okay. That's fine.

15 MR. BENNION: What I propose, Your Honor, is that we
16 get together and make a proposed order.

17 THE COURT: That would be fine, but please don't use
18 the one that the magistrate uses.

19 MR. BENNION: Okay. We'll tailor it to our specific
20 case.

21 THE COURT: Simple, target dates, times.

22 MR. BENNION: Will do.

23 THE COURT: Anything else we need to talk about? If
24 not, thanks. Appreciate your help.

25 (HEARING CONCLUDED AT 1:50 PM)

Certificate of Reporter

I, Raymond P. Fenlon, Official Court Reporter for the United States District Court, District of Utah, do hereby certify that I reported in my official capacity, the proceedings had upon the hearing in the case of Mrs. Fields Franchising, LLC Vs. Bektrom Foods, Inc., case No. 2:14-CV-776, in said court, on the 25th day of August, 2015.

I further certify that the foregoing pages constitute the official Transcript of said proceedings as taken from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name this 27th day of August, 2015.

/s/ Raymond P. Fenlon